TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 65.

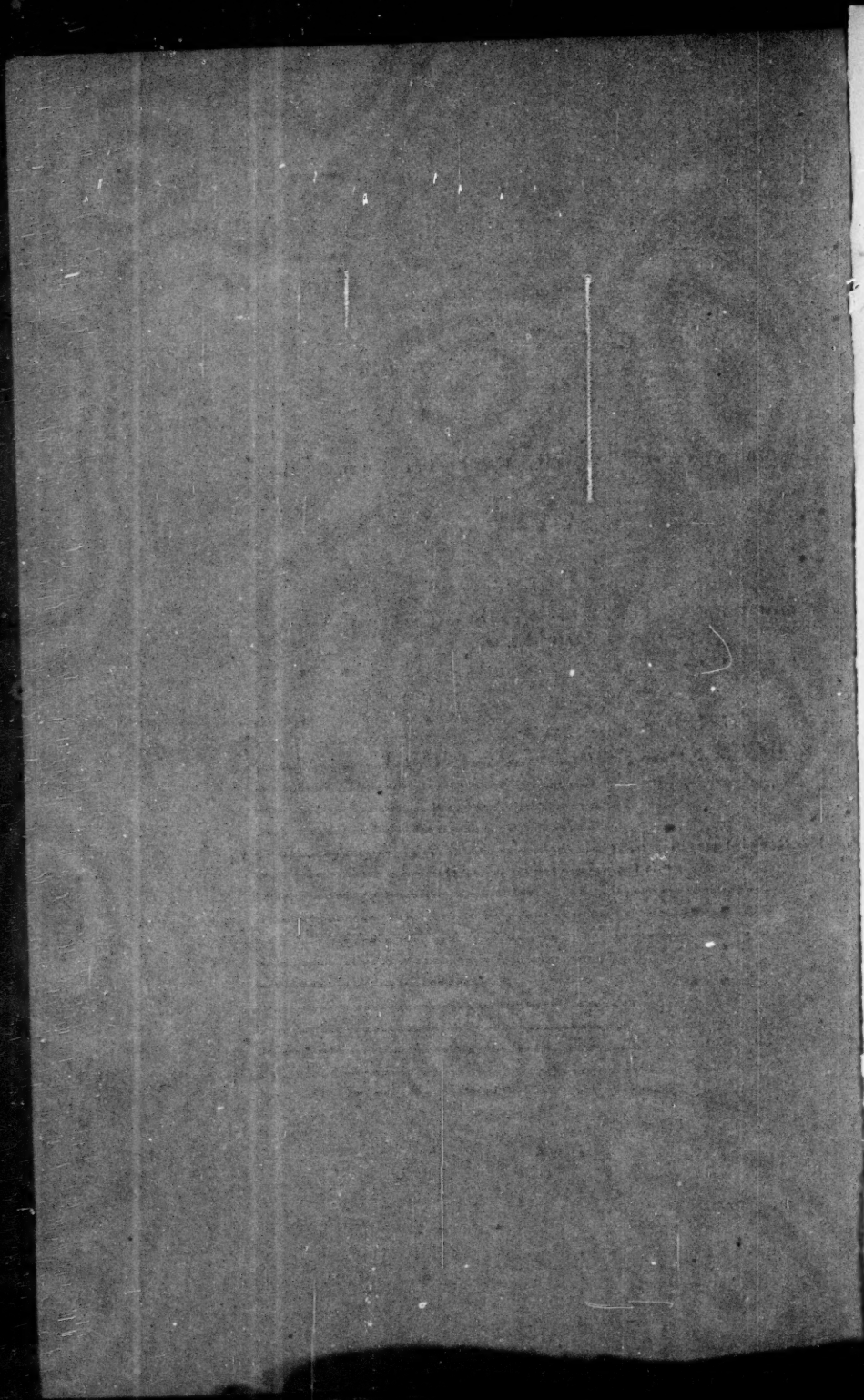
THE FRANKLIN BANK OF CINCINNATI, APPELLANT,

vs.

THEODORE COOK, ALEXANDER M'GUFFEY, AND JAMES G. BARNEY, TRUSTEES, &c. OF D. ROMAN, JR., A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED [illegible], 1854.



SUPREME COURT OF THE UNITED STATES.

No. 68.

THE MERCHANTS' NATIONAL BANK OF CINCINNATI, APPELLANT,

vs.

THEODORE COOK, ALEXANDER H. McGUFFEY, AND JAMES W. SIBLEY, TRUSTEES OF B. HOMANS, J'R, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the circuit court of the United States, within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati on the first Tuesday of October, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-ninth.

Present, the honorable Philip B. Swing, one of the judges of said court.

Among the proceedings had were the following, to wit:

THEODORE COOK, ALEXANDER H. MCGUFFEY, and James W. Sibley, trustees of the estate of Benjamin Homans, j'r, a bankrupt,

vs.

THE MERCHANTS' NATIONAL BANK OF CINCINNATI and Benjamin Homans, j'r.

No. 1293. In chancery.

Be it remembered that heretofore, to wit, on the fifth day of March, in the year of our Lord one thousand eight hundred and seventy, came the said complainants, by their solicitors, Hoadley, Jackson and Johnson, and filed in the clerk's office of the court aforesaid their cer-

2 tain bill of complaint against the said defendants clothed in the words and figures following, to wit:

Bill of complaint.

To the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, in chancery sitting:

Humbly complaining, show unto your honors, your orators, Theodore Cook, Alexander H. McGuffey, and James W. Sibley, of the city of Cincinnati, in said district, that before and on the 26th day of August, 1869, Benjamin Homans, j'r, was a banker carrying on business in the city of Cincinnati, in said district; that the defendant, The Merchants' National Bank of Cincinnati, was and is a banking corporation duly organized under the laws of the United States, having its place of business in said city; that on said day said Homans was indebted and liable to said bank in a large amount of money for exchange on New York, drawn by him and sold to it in the shape of bills of exchange, which he had no money nor other provision to meet in New York; but said debt and liability your orators are not informed sufficiently to enable them better to describe; that said Homans was then and there insolvent; that said Homans was then and there the owner and possessed of divers choses

3 in action, among which was the following, viz:

A draft or bill of exchange drawn by W. S. Hazard to his own order and endorsed by him, upon G. S. Hazard, and accepted by him, dated July 15, 1869, and payable ninety days after date, for the sum of fifteen hundred dollars.

A promissory note made by Bassett & Powell, endorsed by Geo. P. Bassett, dated July 7, 1869, and payable 90 days after date, for the sum of five hundred dollars.

A promis'ory note made by Bassett and Powell, endorsed by Geo. P. Bassett, and dated June 18, 1869, and payable in 90 days after date, for the sum of one thousand dollars.

Another promis'ory note made by J. H. White and endorsed by Frank H. Baldwin, dated July 6, 1869, and payable three months after date, for the sum of five hundred dollars.

Another promis'ory note made and endorsed by C. E. Dawes to Southern Ohio Coal Co., dated March 20, 1869, payable 8 months after date, for five hundred dollars.

Another promis'ory note made and endorsed by C. E. Dawes to Southern Ohio Coal Company, dated March 20, 1869, and payable 6 months after date, for the sum of five hundred and fifty dollars and fifty cents.

Another promis'ory note made and endorsed by John B. Walker, dated August 3rd, 1869, and payable 60 days after date, for the sum of two hundred dollars.

4 Another promis'ory note made by W'm H. Moore, and endorsed by J. H. White, dated June 1, 1869, payable 3 months after date, for the sum of seven hundred dollars.

Another promis'ory note, made and endorsed by Edgar Conkling, dated July 27, 1869, payable 30 days after date, for the sum of eleven hundred and forty dollars.

Another promis'ory note, made by the Diamond Mill Co., and endorsed by Henry Shaw, dated May 19, 1869, payable 4 months after date, for the sum of three thousand five hundred dollars.

Of all which said choses in action your orators have not sufficient information to enable them to furnish here a more complete description.

And your orators further aver and charge the fact to be that on said 26th of August, 1869, said Homans, being insolvent as aforesaid, did transfer said choses in action to said defendant, said defendant then and there having reasonable cause to believe him insolvent, in and by way of security for said debt so as aforesaid owing by him to said defendant, for the purpose of giving to said defendant a preference, and for the further purpose of evading the provisions of the act of Congress approved March 2, 1867, an' entitled "An act to establish a uni-

5 form system of bankruptcy throughout the United States," and of impairing and hindering the operation and effect of said act, and preventing said choses in action from being distributed under the same equally among his creditors; that said transfer was fraudulent as against the other creditors of said Homans, who were and are numerous and in large amounts, and liable to be avoided by them by proceedings to that effect under said act and otherwise.

And your orators further aver that afterwards, and within four months next after said 26th day of August, 1869, by order and decree of the district court of the United Stutes for the southern district of Ohio, said Homans was duly adjudged a bankrupt; and that, on the 20th day of December, 1869, by order of said court duly entered, these your orators having been before that time duly nominated and confirmed by said court as trustees of the estate of said bankrupt under the forty-third section of said act, said bankrupt was directed to convey to your orators all his property and estate under oath, which he has done.

And your orators further say that they have duly demanded of

6 the defendant restitution of the said choses in action so fraudulently transfer'ed to it by said bankrupt, but the defendant has refused compliance with this their just request.

And your orators are informed and believe, and so charge the fact to be, that said defendant has collected large sums of money upon said choses in action; but of the amount and the dates of collection your orators are not informed, and, for the purpose of ascertaining the same, they pray for the exercise of the compulsory process of this court to compel a discovery thereof.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief herein and hereby prayed,

and may, upon the corporal oath of its president, cashier, and other authorized officer enabled to make answer hereto by knowledge of the facts as to which inquiry is here made, and according to the best and utmost of the knowledge, remembrance, information, and belief of such president, cashier, or officer, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, your orators hereto subjoin the interrogatories following, to wit:

1. State whether Benjamin Homans, j'r, transfer'ed to the Merchants' National Bank of Cincinnati the several choses in action herein-
7 before described, or any of them, on or about August 26, 1869. If yea, set forth copies of such choses in action so transfer'ed, and make the same part of the answer in this case.

2. Upon what consideration was such transfer made? If as security for a debt or liability, describe such debt or liability and furnish and make part of the answer in this case, full and true copies of any bill or bills of exchange or other writings creating or evidencing such debt or liability.

3. State whether any moneys or other valuable things have been received and collected by said defendant since such transfer upon any of said choses in action? If yea, what are the same, and if money, state the amount thereof, by whom and when paid. If any securities have been taken on account of said choses in action or any of them, describe the same and furnish full and true copies of any such securities if in writing. If any of said choses in action have been renewed or extended. describe the same and furnish full and true copies of any renewal, or extension agreement if in writing, or of any chose in action received in such renewal or extension.

Wherefore your orators pray that the Merchants' National Bank of Cincinnati and Benjamin Homans, j'r, may be made defend-
8 ants hereto; that process of subpœna may be awarded against them; that said bank, by its president, cashier and other officers sufficiently informed as aforesaid, be compelled to answer and under oath make discovery as aforesaid; that said transfer of said choses in action may be set aside and held for naught as being in fraud of the just rights of the creditors of said bankrupt and of the provisions of said act; that said bank may be decreed and held to be a trustee for the complainants of said choses in action and of all the renewals and extensions thereof, and of all moneys or other valuable things received on account thereof; that said bank may be required to set forth and state an account for all its collections upon said choses in action or any of them, and required to account with the complainants therefor, and pay them any and all moneys received from such collection, and to deliver and surrender up as many and such of said choses in action as remain uncollected, and all securities received thereon, and all renewals and extensions thereof, and that complainants may have such other and further relief as equity and good conscience may require.

HOADLEY, JACKSON & JOHNSON,
Att'ys for Complainants.

9 *Security for costs.*

On which said bill was the following indorsement, to wit:

I acknowledge myself to be security for all costs for which the complainants may become liable in this cause.

OLIVER PERIN.

Afterwards, to wit, on the day and year aforesaid, thereupon there was issued out of the said clerk's office our certain writ of subpœna, clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the Merchants' National Bank of Cincinnati and Benjamin Homans, j'r, citizens of and resident of the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio, aforesaid, at Cincinnati, on the first Monday in April next, to answer a certain bill in chancery, filed and exhibited in said court against them by
10 Theodore Cook, Alexander H. McGuffey, and James W. Sibley, trustees of Benjamin Homans, j'r, in bankruptcy, citizens of and resident in the State of Ohio.

Hereof you are not to fail, under the penalty of the laws thence ensuing.

And have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States of America.

[SEAL.] Attest: JOHN McLEAN, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court, on or before the first Monday of April, 1870, otherwise the said bill may be taken pro confesso.

JOHN McLEAN, *Clerk.*

And afterwards, to wit, on the fourth day of April, in the year aforesaid, came the marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's return.

Marshal's return of service.

CINCINNATI, OHIO, *M'ch* 12, 1870.

Received this writ March 7, 1870, at 12 m., and this 12th day of
11 March, 1870, at 10.30 a. m., served the within named, the Merchants' National Bank of Cincinnati, by delivering a copy of the within to D. J. Fallis, (personally,) president of the above-named bank.

A. HICKENLOOPER, *Marshal,*
By J. H. MARPE, *Deputy.*

CINCINNATI, *April* 2, 1870.

Served the within named Benj. Homan, j'r, personally, by copy this day.

A. HICKENLOOPE *U. S. M.,*
By C. T. VANSICKLEN, *Deputy.*

And afterwards, to wit, on the twelfth day of May, in the year aforesaid, came the said Merchants' National Bank, by Stanley Matthews, its solicitor, and, by leave of court first had and obtained, filed in the clerk's office of the court aforesaid its seperate answer to *to* the bill of complaint herein, clothed in the words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA,
Southern District of Ohio:

In the circuit court of the United States for said dis't.

THE MERCHANTS' NATIONAL BANK AND BENjamin Homans, j'r, def'ts, *advs.* 12 THEODORE COOKE, ALEXANDER H. McGuffey, and James W. Sibley, complainants. } In chancery.

The seperate answer of the Merchants' National Bank to the bill of complaint of the said complainants.

The defendant, the Merchants' National Bank, without waiving any exceptions to the bill of complaint of the said complainants, by reason of its insufficiency or otherwise, for answer thereto or to so much and such parts thereof at it is advised are material to be answered, answers and says:

1. It admits that before and until the 26th day of August, 1869, its codefendant, Benjamin Homans, j'r, was a banker, carrying on business in the city of Cincinnati, in said district, and alleges that until that day the said Benjamin Homans, j'r, was, and had always been, in good credit and standing in his business, without any suspicion whatever on the part of this respondent, or on the part of any others, so far as this respondent knew or believed, that the said Benjamin Homans, j'r, was not solvent and abundantly able to meet all his engagements promptly as they matured; and this respondent had for a long
13 time previously, and continued so to do, until the day last aforesaid, dealt with him as a banker in perfectly solvent circumstances and of good credit, particularly in purchasing from him, according to the usual course of business between bankers, for cash, his sight drafts or checks on New York, this respondent being engaged in business as a banking corporation in said city, duly organized under the laws of the United States; and this defendant also admits that said Benjamin Homans, j'r, on the said 26th day of August, 1869, suspended payment and business as a banker as aforesaid, by reason, as this respondent was afterwards informed and believes, of his insolvency.

2. In further answering, this respondent says that on the 25th day of August, 1869, the said Benjamin Homans, j'r, offered to this respondent for sale, and this respondent agreed to buy and did buy, his sight draft or check on New York, of which the following is a copy, viz:

$15,607. HOMANS & Co., BANKERS,
Cincinnati, Ohio, Aug. 25th, 1869.

Pay to the order of H. C. Yergason, cash'r, ten thousand dollars in bankable funds, ($10,000.)

To THE MARKET NATIONAL BANK, *New York.*
(Signed) HOMANS & CO.

14 Across the face of which was written the word "Original," the said H. C. Yergason, the payee thereof, being the cashier of the Merchants' National Bank, this respondent.

That this respondent, on the delivery of said draft by the said Homans, paid to him therefor the sum of nine thousand nine hundred and eighty-seven $\frac{50}{100}$ ($9,987.50) dollars in money, which was the full and customary market rate and price thereof in said city on that day.

That *it* immediately thereafter, and in the due and regular course of business, this defendant, by the said H. C. Yergason, its cashier, endorsed the said draft or check as follows: "Pay Central National Bank, N. York, or order. H. C. Yergason, cas;" the said Central National Bank of New York being the correspondent and agent for collection of this respondent in New York, and thereupon by mail, on the same day, remitted said draft to its said correspondent and agent in New York for presentation and collection.

That on the 28th day of August, 1869, the said draft or check was duly presented to the Market *M*ational Bank in New York for payment, which being refused, the same on said day was protested for non-payment, and returned to this respondent, who still holds the same,
15 ready to produce as the court may require and direct.

And this respondent avers that on the said 25th day of August, 1869, when it purchased the said draft or check, it did not know, beli've, or suspect that the said Benjamin Homans, j'r, was insolvent, and had no reason to believe or suspect that he was, and the fact that he purchased and paid for said exchange, as above alleged, is conclusive proof that it regarded him as abundantly able to meet his engagements, and expected him to continue the regular and ordinary prosecution of his business.

3. In further answering, this respondent says that early on the morning of the 26th day of August, 1869, about the regular hour for opening business, it received from the said Benjamin Homans, j'r, the two bills and notes set out in the complainant's bill, and which are therein accurately described, so far as this respondent is now able to remember or ascertain from any entries or memoranda in its books, all of the same having been paid or renewed; the originals have been surrende'd to the parties paying or renewing, and this respondent having preserved no copies thereof, is unable to set them out more particularly, the said bills and notes being contained in a package left at the banking-house of this respondent, and the same being contained in a letter from
16 the said Homans to this respondent, the original of which is still in its possession, ready to be produced as the court may require and direct, and of which the following is a copy, viz:

HOMANS & CO., BANKERS,
23 *West Third Street, Cincinnati, Aug. 25th*, 1869.

D. J. FALLIS, Esqr., *Pres't:*

DEAR SIR: A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security.

B. HOMANS, J'R.

And this respondent avers that on the receipt of this letter, and the said securities enclosed therein, this respondent had no knowledge whatever that the said Homans was insolvent, or was contemplating insolvency; had no knowledge that he had or was about to suspend payment or stop business, and had no reason to expect or believe so; but sup-

posing merely from the terms of said note that, owing to some unexplained cause, the arrangements of the said Homans in New York, for the protection of his credit and the payment of his drafts, might have temporarily failed, or that he had reason to suppose that they might do so, out of abundant care for his honor and reputation for integrity,
17 he had deemed it right to deposit collateral security, to protect those who had purchased his New York exchange, this respondent, without any other or further knowledge, information, or belief, accepted the said bills and notes, and entered them on its books to the account of Benjamin Homans, j'r, as collateral security for the payment of the said checks on the Market National Bank of New York; and this respondent denies that at the time of the transfer of said choses in action by the said Homans to this respondent, in the manner and circumstances above set forth, this respondent had reasonable cause to believe the said Benjamin Homans, j'r, to be insolvent, and it also denies that the said Homans made said transfer for the purpose of giving to this respondent a preference, or for the purpose of evading the provisions of the act of Congress approved March 2d, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and of impairing or hindering the operation and effect of said act, and preventing said choses in action from being distributed under the same equally among his creditors, and this respondent denies that said transfer was fraudulent as against the other creditors of said Homans.

4. In further answering, this respondent says that it admits
18 that afterwards and within four months next after said 26th day of August, 1869, by order and decree of the district court of the United States for the southern district of Ohio, said Homans was duly adjudged a bankrupt, and that on the 20th day of December, 1869, by order of said court duly entered, the said complainants having been before that time duly nominated and confirmed by said court as trustees of the estate of said bankrupt, under the forty-third section of said act, said bankrupt was directed to convey to the complainants all his personal property and estate under oath, which he has done, and that the complainants have demanded of this defendant the surrender to them of said choses in action, so received by this respondent as aforesaid, or the proceeds thereof, which demand this respondent has refused to comply with, claiming that it has good right, both at law and in equity, to retain the same, and apply the proceeds when collected to the payment of said protested check.

5. In further answering, this respondent admits that it has proceeded to collect the said several bills and notes so received by it as aforesaid from the said Homans, or the same have matured and become payable, and has collected all of the same except the one last mentioned, being the promis'ory note of the Diamond Mill Manufacturing Com-
19 pany, endorsed by Henry Shaw, dated May 19, 1869, payable four months after date, which, by consent of the complainants, this defendant surrendered on a renewal thereof, and received in lieu thereof two promis'ory notes made by the said Diamond Mill Manufacturing Company, dated January 20, 1870, and endorsed by Henry Shaw, one for twenty-three hundred and eighty dollars, payable January 23rd, 1871, with interest, and the other for twelve hundred and sixty $\frac{55}{100}$ dollars, payable July 23rd, 1871, with interest, which this defendant now holds, and which it is ready to produce as the court may require and direct, and copies of which are hereto annexed, marked "Exhibit No. 1 and No. 2."

6. In further answering, this respondent says, in answer to the first in-

terrogatory in said bill contained, that the said Benjamin Homans, j'r, did transfer to this respondent the several choses in action therein described, on the 25th day of August, 1869, as hereinbefore stated; but this respondent, for the reason above set forth, is unable to furnish copies thereof, but admits they are correctly described in that bill.

7. In further answering, this respondent says, in answer to the second interrogatory in said bill contained, the consideration upon which said transfer was made was to secure this respondent against the fail-
20 ure of the said Homans to cause his said sight draft on the Market National Bank of New York, purchased from him by this respondent on the 25th day of August, 1869, to be paid on presentation, a copy of which is set forth above in this answer, together with all the circumstances of the transaction, and which is hereby referred to, and to be taken as part of this answer.

8. This respondent, in further answering, in answer to the third interrogatory in said bill contained, says that the following is the correct statement of the amounts of money collected and received by this respondent on account of the said bills and notes transfer'ed to it by the said Homans, together with the dates of the several payments, viz:

1. September 4, 1869, on note made by W. H. Moore, endorsed by J. H. White, dated June 1, 1869, payable three months after date, for seven hundred dollars, the sum of seven hundred dollars, (700.00.)

2. September 18, 1869, on note made by Bassett & Powell, and endorsed by George P. Bassett, dated June 18, 1869, payable ninety days after date, for the sum of one thousand dollars, the sum of one thousand and twenty-five $\frac{83}{100}$ dollars, (1,025.83.)

3. September 22, 1869, on note made and endorsed by Edgar Conkling, dated July 27, 1869, payable thirty days after date, for the
21 sum of eleven hundred and forty dollars, the sum of eleven hundred and forty-four $\frac{56}{100}$ dollars, (1,144.56.)

4. September 23, 1869, on note made and endorsed by E. C. Dawes to Southern Ohio Coal Company, dated March 10, 1869, payable six months after date, for the sum of five hundred and fifty $\frac{50}{100}$ dollars, the sum of five hundred and fifty $\frac{50}{100}$ dollars, (550.50.)

5. October 5, 1869, on note made and endorsed by J. B. Walker, dated August 3, 1869, payable sixty days after date, for the sum of two hundred dollars, the sum of two hundred dollars, (200.00.)

6. October 8, 1869, on note made by Bassett & Powell, endorsed by George P. Bassett, dated July 7, 1869, payable ninety days after date, for the sum of five hundred dollars, the sum of five hundred and ten $\frac{33}{100}$ dollars, ($510\frac{33}{100}$.)

7. October 9, 1869, on note made by J. H. White, and endorsed by Frank H. Baldwin, dated July 6, 1869, payable three months after date, for the sum of five hundred dollars, the sum of five hundred dollars, (500.00.)

8. On November 20, 1869, on draft drawn by G. S. Hazard to his own order, and endorsed by him upon G. S. Hazard, and accepted by
22 him, dated July 15, 1869, payable ninety days after date, of fifteen hundred dollars, the sum of fifteen hundred and eleven $\frac{67}{100}$ dollars, (1,511.67.)

9. On November 23, 1869, on note made and endorsed C. E. Dawes to Southern Ohio Coal Company, dated March 20, 1869, payable eight months after date, for the sum of five hundred dollars, the sum of five hundred dollars, (500.00.)

Making in all, collected in cash, the sum of six thousand six hundred and forty-two $\frac{89}{100}$ dollars, ($6,642.89.)

The said note made by the Diamond Mill Manufacturing Company, not having been paid at maturity, was renewed by this respondent, with the assent of the complainants, as hereinbefore stated, and two other notes received by this respondent in lieu thereof, of which copies have already been herein set out and exhibited.

9. In further answering, the respondent denies all other matters and things in the said bill of complaint contained, not hereinbefore specifically answered, and especially all charges and allegations of fraud
23 on its part, or on the part of the said Benjamin Homans, j'r, and all knowledge on its part of any fraud committed or contemplated by him or others, and all knowledge on its part of his insolvency, and any belief of the same, and all ground of knowledge or belief thereof; and, on the contrary thereof, alleges that everything on the part of this respondent in reference to said transaction was done in utmost good faith, and, as it believes, on the part of the said Homans, without any intent or design on the part of either to hinder, delay, injure, or defraud the complainants, or any of the creditors of the said Homans, or to impair or defeat the operation and effect of the act of Congress aforesaid; and having fully answered this, respondent prays to be hence dismissed, with its reasonable costs.

STANLEY MATTHEWS,
Sol'r for Def'd't.

UNITED STATES OF AMERICA,
Southern District of Ohio :

Personally appeared before me Daniel J. Fallis, who, being duly sworn, deposes and says that he is the president of the Merchants' National Bank of Cincinnati, the above-named respondent, and
24 that the matters and things stated in the foregoing answer so far as stated upon personal knowledge of himself or other officers said bank are true, and so far as stated from the information of others he believes the same to be true.

D. J. FALLIS.

Subscribed and sworn to before me this 15th day of April, A. D. 1870.

C. B. MATTHEWS,
N. P., Hamilton Co., O.

EXHIBIT No 1.

$2,380.] CINCINNATI, *Jan'y 20th*, 1870.

Twelve months after date we promise to pay to the order of Henry Shaw, with interest from date, twenty-three hundred and eighty dollars, payable at the Fourth National Bank—value received.

THE DIAMOND MILL MAN'F'G CO.
B. HOMANS, J'R, *President.*

No. 24. Due.
(Endorsed :) Henry Shaw.

EXHIBIT No. 2.

$1,260.58.] CINCINNATI, *January 20th*, 1870.

Eighteen months after date I promise to pay to the order of myself, with interest from date, twelve hundred and sixty $\frac{58}{100}$ dol
25 lars, payable at the Fourth National Bank—value received.

HENRY SHAW.

No. ——. Due.
(Endorsed :) Henry Shaw.

terrogatory in said bill contained, that the said Benjamin Homans, j'r, did transfer to this respondent the several choses in action therein described, on the 25th day of August, 1869, as hereinbefore stated; but this respondent, for the reason above set forth, is unable to furnish copies thereof, but admits they are correctly described in that bill.

7. In further answering, this respondent says, in answer to the second interrogatory in said bill contained, the consideration upon which said transfer was made was to secure this respondent against the fail-
20 ure of the said Homans to cause his said sight draft on the Market National Bank of New York, purchased from him by this respondent on the 25th day of August, 1869, to be paid on presentation, a copy of which is set forth above in this answer, together with all the circumstances of the transaction, and which is hereby referred to, and to be taken as part of this answer.

8. This respondent, in further answering, in answer to the third interrogatory in said bill contained, says that the following is the correct statement of the amounts of money collected and received by this respondent on account of the said bills and notes transfer'ed to it by the said Homans, together with the dates of the several payments, viz:

1. September 4, 1869, on note made by W. H. Moore, endorsed by J. H. White, dated June 1, 1869, payable three months after date, for seven hundred dollars, the sum of seven hundred dollars, (700.00.)

2. September 18, 1869, on note made by Bassett & Powell, and endorsed by George P. Bassett, dated June 18, 1869, payable ninety days after date, for the sum of one thousand dollars, the sum of one thousand and twenty-five $\frac{83}{100}$ dollars, (1,025.83.)

3. September 22, 1869, on note made and endorsed by Edgar Conkling, dated July 27, 1869, payable thirty days after date, for the
21 sum of eleven hundred and forty dollars, the sum of eleven hundred and forty-four $\frac{56}{100}$ dollars, (1,144.56.)

4. September 23, 1869, on note made and endorsed by E. C. Dawes to Southern Ohio Coal Company, dated March 10, 1869, payable six months after date, for the sum of five hundred and fifty $\frac{50}{100}$ dollars, the sum of five hundred and fifty $\frac{50}{100}$ dollars, (550.50.)

5. October 5, 1869, on note made and endorsed by J. B. Walker, dated August 3, 1869, payable sixty days after date, for the sum of two hundred dollars, the sum of two hundred dollars, (200.00.)

6. October 8, 1869, on note made by Bassett & Powell, endorsed by George P. Bassett, dated July 7, 1869, payable ninety days after date, for the sum of five hundred dollars, the sum of five hundred and ten $\frac{33}{100}$ dollars, ($510\frac{33}{100}$.)

7. October 9, 1869, on note made by J. H. White, and endorsed by Frank H. Baldwin, dated July 6, 1869, payable three months after date, for the sum of five hundred dollars, the sum of five hundred dollars, (500.00.)

8. On November 20, 1869, on draft drawn by G. S. Hazard to his own order, and endorsed by him upon G. S. Hazard, and accepted by
22 him, dated July 15, 1869, payable ninety days after date, of fifteen hundred dollars, the sum of fifteen hundred and eleven $\frac{67}{100}$ dollars, (1,511.67.)

9. On November 23, 1869, on note made and endorsed C. E. Dawes to Southern Ohio Coal Company, dated March 20, 1869, payable eight months after date, for the sum of five hundred dollars, the sum of five hundred dollars, (500.00.)

Making in all, collected in cash, the sum of six thousand six hundred and forty-two $\frac{89}{100}$ dollars, ($6,642.89.)

The said note made by the Diamond Mill Manufacturing Company, not having been paid at maturity, was renewed by this respondent, with the assent of the complainants, as hereinbefore stated, and two other notes received by this respondent in lieu thereof, of which copies have already been herein set out and exhibited.

9. In further answering, the respondent denies all other matters and things in the said bill of complaint contained, not hereinbefore specifically answered, and especially all charges and allegations of fraud
23 on its part, or on the part of the said Benjamin Homans, j'r, and all knowledge on its part of any fraud committed or contemplated by him or others, and all knowledge on its part of his insolvency, and any belief of the same, and all ground of knowledge or belief thereof; and, on the contrary thereof, alleges that everything on the part of this respondent in reference to said transaction was done in utmost good faith, and, as it believes, on the part of the said Homans, without any intent or design on the part of either to hinder, delay, injure, or defraud the complainants, or any of the creditors of the said Homans, or to impair or defeat the operation and effect of the act of Congress aforesaid; and having fully answered this, respondent prays to be hence dismissed, with its reasonable costs.

STANLEY MATTHEWS,
Sol'r for Def'd't.

UNITED STATES OF AMERICA,
Southern District of Ohio:

Personally appeared before me Daniel J. Fallis, who, being duly sworn, deposes and says that he is the president of the Merchants' National Bank of Cincinnati, the above-named respondent, and
24 that the matters and things stated in the foregoing answer so far as stated upon personal knowledge of himself or other officers said bank are true, and so far as stated from the information of others he believes the same to be true.

D. J. FALLIS.

Subscribed and sworn to before me this 15th day of April, A. D. 1870.

C. B. MATTHEWS,
N. P., Hamilton Co., O.

EXHIBIT No 1.

$2,380.] CINCINNATI, *Jan'y 20th*, 1870.

Twelve months after date we promise to pay to the order of Henry Shaw, with interest from date, twenty-three hundred and eighty dollars, payable at the Fourth National Bank—value received.

THE DIAMOND MILL MAN'F'G CO.
B. HOMANS, J'R, *President.*

No. 24. Due.
(Endorsed:) Henry Shaw.

EXHIBIT No. 2.

$1,260.58.] CINCINNATI, *January 20th*, 1870.

Eighteen months after date I promise to pay to the order of myself, with interest from date, twelve hundred and sixty $\frac{58}{100}$ dol
25 lars, payable at the Fourth National Bank—value received.

HENRY SHAW.

No. ——. Due.
(Endorsed:) Henry Shaw.

Certificate for thirteen (13) shares of stock in the Diamond Mill Man'f'g Co., left as collatteral on the within.

And afterwards, to wit, on the twentieth day of July, in the year aforesaid, came the said complainants, by their said solicitors, and filed in the clerk's office of the court aforesaid their certain replication to the answer of said defendant, clothed in the words and figures following, to wit:

Replication.

Circuit court of the United States for the southern district of Ohio.
No. 1298.

THEODORE COOK ET AL.
vs.
THE MERCHANTS' NATIONAL BA'K ET AL. } Replication.

And the said complainants come and say that the matters and things set forth in their said bill of complaint are true in substance and in matter of fact, and that the matters and things set forth in
26 the answer of said bank contrary thereto, are untrue. And this they are ready to make appear, as by this court shall be directed.

By HOADLY, JACKSON & JOHNSON,
Their Solicitors.

And afterwards this cause was continued from term to term until the twenty-first day of January, in the year of our Lord one thousand eigh hundred and seventy-five, when the following decree was entered upon the journal of said court, to wit:

Decree.

Circuit court of the United States, southern district of Ohio.

THEODORE COOK, ALEXANDER H. MCGUFFEY, & James W. Sibley, trustees of Benjamin Homans, j'r,
ag'st
THE MERCHANTS' NATION. BANK OF CINCINNATI & Benjamin Homans, j'r. } Final decree.

And now this cause coming on to be heard upon the bill, answer, replication, testimony, exhibits, and argument of counsel, the court, being fully advised in the premises, doth find that the said Benjamin Homans, j'r, being insolvent, did on the 26th day of August, 1869, transfer to said Merchants' National Bank of Cincinnati the choses in action in complainants' bill described, for the purpose of giving said
27 Merchants' National Bank a preference over the other creditors of said Homans, and for the further purpose of evading the provisions of the act of Congress of the United States passed March 2nd, 1867, and entitled "An act to provide and establish a uniform system of bankruptcy throughout the United States," and of impairing the operation of said act and preventing said choses in action from being distributed under the same equally among the creditors of said Ho-

mans; that said transfer was fraudulent and void as against the other creditors of said Homans.

And the court doth further find that, at the time of the transfer aforesaid, the said Merchants' National Bank of Cincinnati had reasonable cause to believe that said Benjamin Homans, j'r, was insolvent, and that the transfer aforesaid was out of the usual and ordinary course of business of said parties.

And the court doth further find that, within four months next succeeding said 26th day of August, 1869, by order of the district court of the United States in and for the southern district of Ohio, said Benjamin Homans, j'r, was declared a bankrupt, and that complainants herein have been duly appointed and qualified as trustees of his estate; that under the 43rd section of the bankruptcy act hereinbefore refer'ed to said Homans has conveyed to them all his property and estate.

28 And the court doth further find that all of the said choses in action have been at various dates since the transfer aforesaid reduced to money by said bank, save note of The Diamond Mill Company, amounting to $3,500, upon which said bank has collected the sum of $1,212.81, and that there is now in the hands of said bank the amount so collected, which, interest thereon from the various dates of payment to January 2nd, 1875, amounts to the sum of $10,188.92.

Wherefore it is considered, ordered, adjudged, and decreed that said Merchants' National Bank pay to complainant said sum of $10,188.92, with interest thereon from the 2nd day of January, A. D. 1875; that said bank pay the costs hereof, taxed at $; that in default of payment of said sum execution issue therefor, and that said bank assign to complainants the note of Diamond Mill Co., for $3,500, with the credits thereon hereinbefor' stated.

And now come the said The Merchants' National Bank, the defendant, and prays the court to allow its appeal to the Supreme Court, which is accordingly done, and the penalty of the bond to be given on said appeal to operate as a supersedeas is fixed by the court at the sum of twenty thousand dollars.

29 And afterwards, to wit, on the twenty-third day of January, in the year last aforesaid, came the said The Merchants' National Bank, and filed in the clerk's office of the court aforesaid its certain supersedeas bond in said cause, clothed in the words and figures following, to wit:

Appeal bond.

Know all men by these presents, that The Merchants' National Bank of Cincinnati, principal, and Daniel I. Fallis, E. W. Cunningham, and Richard Dymond, are firmly held and bound unto Theodore Cook, Alexander H. McGuffey, and James W. Sibley, trustees of B. Homans, j'r, in the sum of twenty thousand dollars, for the faithful payment of which, well and truly to be made, we do hereby bind ourselves, jointly and severally, and our heirs, executors, administrators, and assigns, firmly by these presents. Signed and sealed by us on the 23rd day of January, A. D. 1875.

The condition of the above obligation is such, that whereas the said Merchants' National Bank of Cincinnati, as aforesaid, has obtained an allowance of an appeal from the circuit court of the United States for the southern district of Ohio, in a case wherein the said Theodore Cook et al., trustees, are plaintiffs, and the said Merchants' National

30 Bank of Cincinnati is defendant, in which a decree was en-

tered on the 21st day of January, 1875, and the said Merchants' National Bank praying an appeal to the Supreme Court of the United States, an appeal was allowed upon said Merchants' National Bank filing an appeal-bond in the sum of $20,000:

Now, therefore, the condition of this obligation is such, that if the said Merchants' National Bank shall, with all practicable speed, cause a transcript of the record of said cause to be filed with the clerk of the Supreme Court of the United States, and prosecute said appeal to effect, and answer all damages and costs if they fail to make good their appeal, and abide by all orders and decrees which may be made and rendered by the said Supreme Court of the United States, then these presents shall be void; otherwise to be and remain in full force, virtue, and effect.

MERCHANTS' NAT'L B'K OF CIN'TI, [SEAL.]
By D. I. FALLIS, *Prs.*
D. I. FALLIS. [SEAL.]
E. W. CUNNINGHAM. [SEAL.]
RICH'D DYMOND. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. WINSLOW.

31 *Complainants' testimony.*

B. HOMANS, J'R.

Direct examination by Judge Hoadly:

The said Benjamin Homans, j'r, being first solemnly sworn, deposed and said as follows:

1st quest. State your name, age, and residence, and how soon you expect to leave this district, and how long do you expect to be absent.

Ans. Benjamin Homans, j'r, is my name; age is 44 years; my residence has lately been in Campbell County, Kentucky; I expect to leave this district on Staturday, June 11th, 1870, and I do not know how long I shall remain. I am going to Liverpool, England, to engage in business.

2nd quest. In what business were you engaged prior to August 26, 1869? How long had you been engaged in that business, and where?

Ans. I was engaged in the banking-business prior to August 26, 1869, under the firm-name of Homans & Co. I had been engaged in the business since 1857, on Third street, Cincinnati, Ohio.

3rd qu'st. When did you become apprehensive that you might
32 be compelled to suspend business as a banker? State the day and hour of the day, as near as you can.

Ans. For several weeks preceding my failure I had been embarrassed, but expected such relief as should enable me to overcome the danger up to the afternoon of the day before my closing business; that is, August 25th, at 3 o'clock p.m. My principal trouble was for investments made in the Southern Ohio Coal Company, and loans made to the same. I had summoned one of the gentlemen interested in that company most largely to come here from New York to take measures for my relief. He arrived on the 25th of August, 1869, but, from constant occupation throughout that day, I was compelled to defer conference with him until after 3 o'clock. The result of that conference was to show me that my expectations of relief would not be realized. And I saw clearly that

any further effort to avoid the impending crisis would be useless and wrong. The morning's mail of the 26th brought letters from New York notifying us that we must not any longer overdraw our account at the Market National Ba'k, thus confirming my worst fears.

33 4th question. State all the transactions, fully and in detail, which you had on the 25th and 26th days of August, 1869, with the Merchants' National Bank of Cincinnati, or with any of the officers of said bank on its behalf. Answer this question fully, giving time, places, and circumstances, stating the hour of the day of each transaction, as nearly as possible.

Ans. Having on August 24th, 1869, written to a party in New York who had previously befriended me with a temporary loan to provide for Homans & Co. ten to fifteen thousand dollars, on the 26th or 27th of August I drew against the same as follows:

Between 9 and 10 o'clock a. m. Aug. 25th I went to the Merchants' National Bank and agreed with the cashier, M'r Yergason, to sell that bank Homans & Co.'s check on New York for ($10,000) ten thousand dollars for currency, paying them, as near as I can recollect, the current rate of discount, $\frac{1}{8}$ of 1 per cent., for the check. The bank paid the currency immediately thereafter.

As soon as I realized from the conversation with M'r Johnson, the man who came on from New York in the interest of the Southern Ohio Coal Company, that my failure was im'inent, I knew that the check sold to the Merchants' National Bank would not be paid, and deemed

34 it my duty to protect the same. I decided to send them bills receivable to the amount of the check. I made this decision on the evening of August 25th, but I did not send them until the morning of August 26th. They were taken over to the bank on the morning of the 26th, I think about 10 o'clock, by M'r Wood, our book-keeper.

The bills receivable sent to the bank were as follows:

Acceptance of George S. Hazard, payable 90 days from July 15, 1869, of $1,500.

Bassett & Powell's note, payable 90 days from June 18, 1869, for $1,000, and interest.

J. H. White's note, payable 3 months from July 6, '69, for $500.

E. C. Dawes' note, payable 8 months from March 20, 1869, for $500.

E. C. Dawes' note, payable 6 months from March 20, 1869, for $550.50.

John B. Walker's note, payable 60 days from August 3, 1869, for $200.

W'm H. Moore's note, payable 3 months from June 1, 1869, for $700.

Edgar Conkling's note, payable 30 days from July 27, 1869, for $1,140.

Note made by Diamond Mill Company, payable 4 months from May 19, 1869, for $3,500, and interest. The total being $10,090.50.

I had no conversation with any of the officers of the bank on

35 August 26, 1869, nor on August 25th, after the sale of my check on New York, above referred to.

5th quest. State fully and in detail all the transactions which you had on the 25th and 26th days of August, 1869, with the First National Bank of Cincinnati, or with any officer of said bank. Answer this question fully, giving time, places, and circumstances, stating the hour of the day of each transaction, as nearly as possible.

Ans. I went to the First National Bank about the same time as I did to the Merchants' National Bank, and in like manner agreed with Mr. Forbes, the assistant cashier, to sell them Homans & Co.'s check on

New York for $10,000, at the current rate of discount, for which their teller paid the currency immediately thereafter.

I acted toward them exactly as mentioned towards the Merchants', M'r Wood taking to them, on the morning of the 26th of August, about 10 o'clock a. m., bills receivable as follows:

Acceptances of Ohio Lard and Sperm Oil Company, three in number, as follows:

One, 90 days from June 11, 1869, for $2,000;

One, for 90 days from June 4th, 1869, for $1,000;

One, due 90 days from June 26, 1869, for $2,000;

36 Note of W'm H. Porter, payable 60 days from Aug. 2, 1869, for $1,000;

Acceptance of James D. Hunt, agent, payable 3 months from June 1, 1869, for $1,029.24;

Note of Geo. W. Cochran, payable 45 days from July 28, 1869, for $1,050;

Note of Diamond Mill Company, payable 3 months from July 21, 1869, for $2,000 and interest. The total amount being $10,079.24.

I had no conversation with any of the officers of the bank after the morning of May 25, 1869.

6th quest. Please state upon what terms the checks on New York sold to the Merchants' & 1st National Banks were payable. Give, as nearly as you can from memory, copies of these checks. State the amounts, dates, and tenor fully.

Ans. The checks were payable on demand, and were as follows:

No. CINCINNATI, *Aug.* 25, 1869.

Pay to the order of H. C. Yergason, cashier, ten thousand dollars.

(Signed) HOMANS & CO.

TO THE MARKET NATIONAL BANK,
New York.

No. CINCINNATI, *Aug.* 25, 1869.

Pay to the order of Theo. Stanwood, cashier, ten thousand dollars.

37 (Signed) HOMANS & CO.

TO THE MARKET NATIONAL BANK,
New York.

The above are exact copies, as nearly as I can remember. The number I do not remember.

7th question. What instructions, if any, were given by you to M'r Wood concerning the bills receivable, and sent to the Merchants' and 1st National Banks?

Answer. I left my office about 9 o'clock a. m. of August 26th, still clinging to a vague hope of obtaining assistance in Covington, and then instructed M'r Wood, if I did not return about 10 o'clock, to deliver to those two banks the envelopes addressed to them, respectively, which contained these bills receivable, and to say to the officer he might see that those securities were to provide for the payment of the check on New York sold to each bank the day before.

8th quest. At what hour on the 26th of August were your doors closed and your business suspended?

Answer. On my way to Covington, about 9 o'clock a. m., I saw,

38 upon reflection, that further effort must be useless, and sent back a note to the clerks in my office to receive no more deposits, pay

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Supreme Court

SUPREME COURT OF THE UNITED STATES.

WILLIAM F. COCHRANE *et al.*, *Appellants*, *vs.* JOSIAH W. DEENER, *et al.*, *Appellees.*	October Term, 1876, No. 744.

And now this first day of ~~October~~ November, A. D. 1877, came before this Court George Harding on behalf o Cadwalader C. Washburne, of Madison, Wisconsin ; John A. Christian, of Minneapolis, Minnesota; George Bain, of St. Louis, Missouri; Alexander H. Smith, of St. Louis, Missouri; Herbert S. Jewell, of Brooklyn, New York, and move the Court to vacate the decree heretofore made in the above case and to dismiss the appeal.

And thereupon show the following facts:—

1st. That at the time of the argument of the said cause in this Court, or prior thereto, the said appellees had surrendered and relinquished to one Abraham H. Herr, the absolute and entire control of the management and conduct of said cause in this Court.

2. That at the time of the argument of the said cause in this Court, or prior thereto, the said Abraham H. Herr entered into an agreement with the said appellants, or with the counsel or agent of said appellants, whereby it was agreed and understood that in case the validity of the reissued patents of William F. Cochrane, on which said suit was instituted, should be affirmed, and the decree prayed for in h

Post
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Rule to show cause

appellant's Bill of Complaint be granted in consequence of the decision of this Court, that the said appellees or the said Herr, or some other person, should receive a license for a nominal consideration in gross, which license was to enure as a release of all claims which could be recovered under said suit, and also as an authority for the subsequent use of said patented inventions during the terms of said Cochrane patents, at two mills owned or controlled by said appellees, and that the injunction prayed for in said Bill of Complaint, if decreed by this Court, was not to be enforced against said appellees.

3d. That it was agreed or understood between the said Herr, or some one acting or claiming to act on behalf of appellees and the appellants, or some one acting or claiming to act on their behalf, or in privity with them or their counsel, that notwithstanding the aforesaid agreement or understandings that the cause should be proceeded with to final hearing or determination in this Court, as if no such understandings or agreements had been made as hereinbefore mentioned.

4th. That by reason of said understandings or agreements, the said appellees and the said Herr ceased to have any substantial interest in defeating a decree in favor of said appellants.

5th. That in consequence of the above-mentioned understandings and agreements, the said Herr acting for said appellees, either with or without the knowledge of the parties of record as appellees, purposely neglected to have the cause of said appellees presented fully to this Court.

On the contrary, the said Herr, or those acting on behalf of appellees, declined and refused to employ certain counsel, who had successfully argued the case on the merits in the Court below, and prohibited other counsel who was familiar with the cause in the Court below, from presenting any argument in this Court, except on the question of jurisdiction.

a note to the clerks in my office to receive no more deposits, pay

That said cause was prosecuted by Herr with the understanding and expectation that it would facilitate the obtaining of a decree in favor of said appellants in this Court.

6th. That the real object of said appellants in prosecuting the cause to a final determination in this Court after said agreements and understandings had been entered into, was to obtain an opinion and judgment of this Court, that should effect the right and interests of persons not parties to this suit as to the validity of said Cochrane's Reissued Patents, and also as to the question of infringment, so far as related to machines and processes similar to those used by the appellees.

7th. That in pursuance of said agreements and understandings, after the determination of said cause in this Court, and notwithstanding the release or quit-claim previously agreed to in favor of said appellees, the said appellants issued the mandate of this Court, and filed the same in the Court below, and there caused a decree to be entered as hereinbefore set forth, the counsel for the appellees assenting to said decree, well knowing that at the time of entering said decree, and long prior thereto, all matter in dispute had been virtually settled and adjusted between the parties. The said decree being as follows, viz.: as will appear by the record in said Court below.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,
May 15, 1877.

WILLIAM F. COCHRANE and others	}	In Equity,
vs.		
JOSIAH W. DEENER and others, *Defts.*	}	No. 4,701.

This cause coming on for further consideration, in pursuance of the mandate of the Supreme Court of the United States; it is, by the Court, this 15th day of May, A. D. 1877,

ordered, adjudged, and decreed, that the patent issued to William F. Cochrane on the 21st of April, 1874, and by him assigned to the complainants, being re-issue No. 5,841 of original Patent No. 37,317, being for a process of purifying middlings meal, is valid, the said William F. Cochrane being the first inventor of said process, and his said invention thereof antedating the Patent of Cogswell and McKiernan and of Perigault, referred to in the proceedings, and that the machinery and devices used by the defendants are an infringement of said Patents.

It is further adjudged and decreed that the reissued Patents Nos. 6,030, 6,594, and 6,595, issued to said Wm. F. Cochrane, and by him assigned to complainants, being for combinations of parts of the machinery required for bolting flour and purifying the middlings, according to the process described in the first named patent, are valid patents, and are infringed by the defendants, by the use of the machinery employed by them.

It is further adjudged and decreed, that the complainants are entitled to recover from the said defendants, as damages for such infringements, whatever profit or saving had been effected by them by the use of the inventions covered by the said patents of the complainants, the amount of which is to be ascertained by a reference to the auditor of the Court, and that said defendants be, and they are hereby perpetually restrained and enjoined, and prohibited from using the said inventions without the license and permission of the complainants.

It is further adjudged and decreed, that the original patent No. 37,219, for a pump for introducing meal into the chest and reel, and original patent No. 37,320, for certain combinations of machinery, are not infringed by the defendants, and that, as to the alleged infringements thereof, the bill be dismissed.

It is further adjudged and decreed, that the complainants recover from the defendants their costs in this cause, to be taxed by the clerk.

By order of the Court.

D. K. CARTTER, *Chief Justice.*

I consider this decree in conformity with the decision of Supreme Court.

A. L. MERRIMAN.

I certify that the foregoing writing is a true copy of the original decree on file and of record in the Clerk's Office of the Supreme Court of the District of Columbia.

Witness my hand and the seal of said Court, September 5, 1877.

[SEAL.] R. J. MEIGS, *Clerk.*

8th. That the said appellees have, since the date of entering said decree, in pursuance of the agreement hereinbefore mentioned, abstained from enforcing the above decree against the said appellees, and have also omitted to take the account ordered thereon, or to tax or collect from appellees the costs incurred in this Court, or in the Court below.

9th. That after the said determination of the cause in this Court, and the entry of decree in the Court below, as above set forth, numerous bills in equity have been filed in the Circuit Court of the United States for the District of Minnesota, the District of Missouri, the Eastern District of New York, and in numerous other districts in the names of the American Middling Company as assignees of the said appellant, of which Company Rodney Mason, one of the above appellants is the Vice-President and Attorney in charge of their legal affairs.

That the several parties appellant in said suit are the Stockholders of the corporation known as the American

Middlings Purifier Company the assignees of said appellants.

That in each of said several Bills of Complaint, it is charged, among other things, that by the decision of the said Court (meaning this Court), it became *res adjudicata* that said patents of said Cochrane are valid, and that the defendants had infringed the said Letters Patent by the use of their process and machinery.

That motions for special injunction have been made in the Circuit Courts of the United States, in which it is insisted that the several defendants in said several suits are stopped upon the hearing of said motions from denying the validity of said Cochrane Patents, and also of denying the infringement by the use of machinery or processes substantially similar to them used by the said appellees. That the said Rodney Mason one of the appellants, appears as affiant to the said Bill of Complaint in each instance, and that said Rodney Mason had knowledge of, or was in some way privy to the understandings and agreements hereinbefore mentioned.

10th. That since the adjournment of this Court, at the close of the last term, and the entry of the decree in the Court below, it has been communicated to some of the parties to this motion, by A. L. Merriman, Esq., a counsellor and officer of this Court, and one of the counsel who participated in the argument of the cause on behalf of appellees in this Court, that the appellees, or the party or parties controlling the case on their behalf were not at the time of said argument really interested in opposing a decree in favor of said appellants, as will appear by a communication to one Blakely, and through him to the other parties to this motion.

That said communication was made voluntarily at the sole instance and motion of said A. L. Merriman, Esq., and

without any knowledge, suggestion, or privity of the said parties to this motion, or any one acting on their behalf, or in privity with them.

That George B. Selden, acting as attorney for some of the parties to this motion, called upon said A. L. Merriman, Esq., at his office in Washington, in pursuance of the information and notice in the aforesaid communication, and was informed by said Merriman substantially as in said letter to Russell Blakley, and that he, Merriman, was possessed of information as to the circumstances under which the said case was presented to this Court, which would, in his judgment, be sufficient to induce this Court to vacate the decree.

That the said Merriman is not employed as attorney or counsel for or on behalf of the parties to this motion, or in any way interested with them, and they have no power of procuring his voluntary affidavit to the statement made by him.

That the said Rodney Mason, one of the appellants aforesaid, in an affidavit filed in the Circuit Court of the United States, for the Eastern District of Missouri, set forth that an arrangement was made between one of the counsel for appellants, and said Herr, on behalf of appellees, *that if "the case should be submitted* on printed briefs, and decided in favor of complainants, that defendants should not be enjoined," which was what they principally feared, and that they might pay an agreed sum of one thousand dollars, as will appear by a certified copy of said affidavit herewith filed.

That if the questions passed upon in the decision of said suit in this Court are to be considered *res adjudicata*, the milling interest of the country may, for the time being, be placed at the mercy of the parties claiming under the Cochrane Patent, inasmuch as the said parties, by suits and

by notices, threaten all persons by injunction or heavy bonds who do not accede to their demand.

That an order for injunction, based solely or mainly upon said decree of this Court, was granted against one of the milling firms at Minneapolis, prior to the ascertainment by them of the facts as hereinbefore set forth, in which an injunction was ordered to issue in default of a bond of $250,000, and numerous other similar motions are now pending.

That none of the facts upon which this motion is made came to the knowledge of the parties until after the adjournment of the Court at the last term; neither could they have been ascertained by any diligence of inquiry. And in order to establish them fully, it will be necessary to resort to compulsory process to procure testimony.

Upon the facts above stated, counsel, on behalf of his clients, moves the Court to order that a rule be granted to the appellants in said suit, to show cause why said decree should not be vacated and the appeal dismissed, and that leave be given to your petitioner to take depositions on reasonable notice in support of said rule before a proper officer.

GEORGE HARDING,

Of counsel for CADWALADER C. WASHBURN, *and others, parties to this motion.*

In the Supreme Court of the U. S.

WILLIAM F. COCHRANE, WILLIAM WARDER, RODNEY MASON, W. S. COX, *et al.*	
vs.	No. 744.
JOSIAH W. DEENER, GEO. W. CESSEL, JAMES H. WELSH, *et al.*	

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

George B. Selden being duly sworn upon oath, deposes and says:—I am of lawful age, and reside in Rochester, New York; am an attorney-at-law, and one of the attorneys of the Millers' Association of the State of New York.

On or about the sixth day of July, 1877, in Minneapolis, Minnesota, being there in connection with the case of the American Middling Purifier Co. *vs.* John A. Christian *et al*, on behalf of defendants, said cause then and now pending in the United States Circuit Court for the District of Minnesota, I was shown a letter written by A. L. Merriman, Esq., of the Washington Bar, and one of the attorneys of record in the above entitled cause, bearing date June 7th, and addressed to Russell Blakely; I made a copy of this letter then; said letter being in the following language, to wit, as per Schedule "A," hereto annexed:—

(Copy Blakely Letter.)

SCHEDULE A.

A. D. MERRIMAN, 637 F Street, near Seventh, N. W.,

Washington, June 7, 1877.

RUSSELL BLAKELEY,

DEAR CAPTAIN:—Suits have, I understand, been commenced against some of your millers upon the Cochrane Patents. I was counsel for Messrs. Herr and Welch, with whom the test case was tried, and which was decided in the Supreme Court.

In the Supreme Court of the District I, with my associates, obtained a decree against the Patents, but in the Supreme Court, the party representing the defendants, came to the conclusion that it was desirable that the plaintiffs should recover, and employed a new attorney to make the argument in that Court, I refusing to make any argument upon the merits without pay; and I accordingly only filed an argument upon the question of jurisdiction, which I was anxious to have settled. Still I thought even without argument the case would be affirmed. In this, however, I was mistaken.

There is other evidence, however, not in that record, which may serve the other defendants in case of a contest.

I write to you that you may, if you will do so, or feel like it, of suggesting my name as being pretty familiar with the case, and as being able to render service, and if employed, I will do what is right between friends.

Respectfully, &c.,

A. L. MERRIMAN.

(G. B. S.)

Subsequently about the 17th day of August, at the request of Gov. C. C. Washburne, one of the defendants in the case of the American Middling Purifier Co. *vs.* Christian *et al.*, I called on Mr. Merriman, at his office in the City of

Washington, and there had a conversation with him concerning the matters mentioned in his letter, having previously met him, and having a slight acquaintance with him. I referred to the letter above mentioned, and called his attention to the statements therein made. In the course of the conversation which ensued, he voluntarily assured me that there was collusion between the parties to the said suit, or those acting in their behalf; the facts of which had recently come to his knowledge; and that he had in his possession, or under his control, evidence, a part of it documentary, which would prove the fact of such collusion in the management of said cause on behalf of defendants in the Supreme Court: that, in his judgment, the said evidence, if brought to the attention of the Supreme Court, was sufficient to cause the vacating of the decree rendered.

GEO. B. SELDEN.

Sworn and subscribed before me,
this 11th day of September, A.
D. 1877.

W. C. STRAWBRIDGE,
[SEAL.] *Notary Public.*

Circuit Court of the United States,

EASTERN DISTRICT OF MISSOURI.

AMERICAN MIDDLINGS PURIFIER CO.

vs.

THE ATLANTIC MILLING CO.

Rodney Mason, having been duly sworn, deposes and says: that he is the person referred to in the petition filed by George Harding in the Supreme Court of the United States, a copy of which is filed herein; that affiant was charged with the management of the case of Wm. F. Cochran, *et. al. vs.* J. W. Deener, *et. al.*, for complainants; that affiant understood at the time that the defendants were protected by a guarantee of James S. Welch and Abraham H. Herr, their lessors, and respectively fathers of four of the defendants of the same name; that the guarantors were men of large wealth, and directly interested in the result of the suit, not only in the immediate recovery but also as part owners, with their sons, of patents out of which large sums of money had been realized, and which were regarded as very valuable in *not* subject to the Cochrane Patent, and on account of their interest therein they always expressed a desire to have the trial of the Cochrane case expedited, and their attorney entered into a stipulation with us, while the case was still

pending in the Court below, that whoever lost the case should appeal to the first term of the Supreme Court, and that the case should be submitted on printed briefs, under the rule. Both parties desiring an early disposition of the case it was accordingly expedited until the bill was dismissed by the Supreme Court of the District. Then the defendants manifested a disposition to delay and threatened to repudiate the stipulation. Mr. Walter S. Cox, attorney of record in that case, and now President of Complainant Co., entertained grave doubts as to whether the Supreme Court of the United States could enforce the stipulation which had been filed in the Court below, and it was left to him to make some arrangements by which the defendants could be induced to stand by their stipulation, and during the absence of affiant from the City, as affiant has been informed and believes, Mr. Cox arranged with Mr. Herr that if the case should be submitted on printed briefs and decided in favor of complainants, that defendant should not be enjoined, which was what they principally feared, and that they might pay an agreed sum which was not as stated in said petition, a nominal sum, but a *bona fide* and substantial sum, viz.: one thousand dollars and costs, besides which they were subject to an incidental loss in the destruction of the commercial value of their Patent, which affiant believes was not less than thirty thousand dollars, and it is not true as stated in said motion that defendants ceased to have any interest in the defence of said case; on the contrary they had a large direct and incidental interest therein. As to the 5th section of said motion, affiant states that if the said Herr neglected anything relating to the defence it was done without the knowledge of this affiant, or so far as he knows or believes of any of the complainants in said suit. That as affiant was informed and as is stated in the other affidavits filed herein, Mr. Davidge, who argued that case below, refused to prepare a

written argument, and affiant was informed by Judge Merriman, the other counsel, who was familiar with the cause in the Court below, not that he had been prevented from arguing the cause, as stated in said motion, but that he had refused to argue any other question than the one of jurisdiction, unless they would increase his compensation. Affiant knows that said Merriman had been attorney for the Herr and Welch parties long before said suit was instituted, and affiant was informed that he was paid an annual salary. Affiant was informed and believes that upon refusal of Davidge to argue the case, Mr. Herr applied to the President of the Metropolitan Middlings Purifier Co., whose interests were antagonistic to complainants, and on his advice employed Mr. Cady, who had for years been the attorney for said Company, and employed almost exclusively in business relating to Middlings Purifier, and Mr. Cady told affiant after these rumors were stated as to the collusion, that the only instructions he ever received from Mr. Herr, were to argue the case to the best of his ability. This affiant further states that the subsequent proceedings were for the consummation of the legal proceedings, and to fix their rights, and affiant says that he never understood nor believed the case to be collusive or otherwise than in good faith, and denies that he had any knowledge or understanding except as aforesaid. Affiant knows nothing of the alleged statements of Judge Merriman, but he avers upon information and belief, that said Merriman has repeatedly denied that there was any collusion to his knowledge in said case.

And further saith not.

R. MASON.

Subscribed and sworn to before me,
September 20, 1877.

M. M. PRICE, *Clerk.*
A. P. SELBY, *D. C.*

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI. } *ss.*

I, M. M. Price, Clerk of the Circuit Court of the United States, in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true copy of the affidavit of Rodney Mason, in case No. 1,106 of American Middlings Purifier Co., plaintiff, against Atlantic Middling Co., *et al*, defendant, as fully as the same remain on file and of record in said case, in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court, at office in the City of St. Louis, in said District, this 3d day of October, in the year of our Lord, eighteen hundred and seventy-seven.

M. M. PRICE,
Clerk of said Court.
By T. L. CRAWFORD,
Deputy.